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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 WILL SITTON,

8 Plaintiff(s),

9 v.

10 LVMPD, et al.,

11 Defendant(s).

Case No. 2:17-CV-111 JCM (VCF)

ORDER

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13 Presently before the court is Magistrate Judge Ferenbach's report and recommendation  
14 ("R&R"). (ECF No. 139). *Pro se* plaintiff Will Sitton ("Sitton") filed an objection to the R&R  
15 (ECF No. 140). Defendants have not filed a response to plaintiff's objection, and the time to do  
16 so has passed.

17 Also before the court is Sitton's motion for leave to file first amended complaint. (ECF  
18 No. 134). Defendants Jaqueline Bluth, Elissa Luzaich, David Farrara, Wesley Juhl, and Las Vegas  
19 Review Journal ("LVRJ") filed two separate responses (ECF Nos. 136, 137), to which Sitton  
20 replied (ECF No. 138).

21 **I. Facts**

22 Sitton does not object to the factual presentation in the R&R. *See* (ECF No. 140).  
23 Therefore, the court adopts the facts as stated in the R&R and will detail factual and procedural  
24 background in the discussion section of this order as necessary to explain the court's holding.

25 **II. Legal Standard**

26 A party may file specific written objections to the findings and recommendations of a  
27 United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);  
28 LR IB 3-2. Where a party timely objects to a magistrate judge's report and recommendation, the

1 court is required to “make a *de novo* determination of those portions of the [report and  
2 recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). The court “may accept,  
3 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.”  
4 *Id.*

5 Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of  
6 a magistrate judge within fourteen (14) days from the date of service of the findings and  
7 recommendations. Similarly, Local Rule 7-2 provides that a party must file an opposition to a  
8 motion within fourteen (14) days after service of the motion.

### 9 **III. Discussion**

10 In his R&R, Magistrate Judge Ferenbach recommends that Sitton’s motion for leave to file  
11 an amended complaint be denied. (ECF No. 139). In evaluating the sufficiency of Sitton’s motion  
12 and proposed amended complaint (“PAC”) under the standard set forth in *Johnson v. Buckley*,  
13 Magistrate Judge Ferenbach notes that allowing plaintiff to amend his complaint would be futile.  
14 *Id. See Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (“Five factors are taken into  
15 account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice  
16 to the opposing party, futility of amendment, and whether the plaintiff has previously amended the  
17 complaint.”).

18 Specifically, the R&R states that count four of Sitton’s PAC is futile because it asserts a  
19 constitutional defamation claim against defendants Bluth and Luzaich, the prosecutors in the  
20 criminal case to which Sitton was the defendant, for the allegedly defamatory statements they  
21 made to the LVRJ during Sitton’s trial. (ECF No. 139 at 3–4). As Magistrate Judge Ferenbach  
22 correctly notes, “prosecutors have absolute immunity from suits based on activities intimately  
23 associated with the judicial phase of the criminal process,” which includes statements made during  
24 litigation. *Id.* at 4 (internal quotations omitted). *See Imbler v. Pachtman*, 424 U.S. 409, 430–31  
25 (1976); *Bailey v. City Attorney’s Office of N. Las Vegas*, No. 2:13-cv-343-JAD-CWH, 2015 WL  
26 4506179, at \*1 (D. Nev. July 23, 2015).

27 Moreover, the R&R states that the fifth claim in Sitton’s PAC (a state-law defamation  
28 claim) is also futile because the court’s supplemental jurisdiction over that claim depends on its

1 jurisdiction over the fourth claim of the PAC.<sup>1</sup> (ECF No. 139 at 3). Magistrate Judge Ferenbach  
2 reasons that, because the court would have no choice but to dismiss count four of Sitton’s PAC  
3 based on prosecutorial immunity, the court would also have to dismiss count five for lack of  
4 supplemental jurisdiction. *See* 28 U.S.C. § 1367 (“[T]he district courts shall have supplemental  
5 jurisdiction over all other claims that are so related to claims in the action within such original  
6 jurisdiction that they form part of the same case or controversy under Article III of the United  
7 States Constitution.”). Accordingly, Magistrate Judge Ferenbach recommends that Sitton’s  
8 motion be denied, as allowing these claims to proceed would be futile.

9 Sitton “partially” objects to the R&R, arguing that Magistrate Judge Ferenbach should have  
10 considered the sufficiency of the first three claims of the PAC, rather than focusing on the futility  
11 of claims four and five. (ECF No. 140). However, Sitton’s objection fails for two reasons.

12 First, the court cannot dissect a proposed amended complaint, keeping only the claims that  
13 are not futile. When the court grants a motion to amend complaint, the movant’s proposed  
14 amended complaint supplants the previous complaint in its entirety. Therefore, although some of  
15 Sitton’s proposed claims may survive a motion to dismiss, the court is unable to ignore the futility  
16 of his fourth and fifth claims. *See Johnson*, 356 F.3d at 1077.

17 Second, the court agrees with Magistrate Judge Ferenbach that allowing these futile claims  
18 to proceed would unduly prejudice defendants Bluth and Luzaich, as these defendants have already  
19 “successfully litigated motions to dismiss and a motion for reconsideration,” and have been  
20 terminated from this action. (ECF No. 139). The court will not allow Sitton to file an amended  
21 complaint that would hail these defendants back to court to defend against claims the court has  
22 already determined are futile.

23 Accordingly, the court hereby adopts Magistrate Judge Ferenbach’s R&R in its entirety  
24 and will deny Sitton’s motion for leave to amend complaint.

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28 <sup>1</sup> Without the PAC’s fourth claim, which arises under federal law, there would be no factual  
nexus upon which the court could exercise supplemental jurisdiction over Sitton’s state-law  
defamation claim. *See* 28 U.S.C. § 1367.

1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Magistrate Judge  
4 Ferenbach's R&R (ECF No. 139) be, and the same hereby are, ADOPTED.

5 IT IS FURTHER ORDERED that Sitton's motion for leave to amend complaint (ECF No.  
6 134) be, and the same hereby is, DENIED without prejudice.

7 DATED June 18, 2019.

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10 UNITED STATES DISTRICT JUDGE  
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